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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 309

CURTIS TAYLOR,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The questions set forth in the Petition (p. 2) might more properly be stated as follows:

1. Whether it was prejudicial error to admit into evidence the respondent's report of the accident to the Department of Labor, in view of the fact that the Longshoremen's and Harbor Workers' Compensation Act required that such a report be made promptly to such Department.

2. Whether it was prejudicial error to admit that report into evidence in view of the fact that (a) Section 930(c) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 930[c]) provides that such report "shall not be evidence of any fact stated in such report in any proceeding in

respect of such injury or death on account of which the report is made"; (b) the objection based upon this language of Section 930(c) of the Act was not raised at the trial; and (c) the Act did not prohibit the use for any purpose of the copy of the report, which was also admitted into evidence.

Statutes, Rule and Regulations Involved

In addition to the statutes quoted in the Petition (pp. 2-3),* the following statutes, rule and regulations are involved:

A. *Statutes*

(1) The Federal Business Records Act (28 U.S.C. § 1732) provides, in part, as follows:

> "§ 1732. Record made in regular course of business; photographic copies
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

* While petitioner refers to the Federal Business Records Act (28 U.S.C. § 1732) under the heading "Questions Presented", this Act is not quoted under "Statutes Involved".

(2) The New York Civil Practice Act, Section 374-a (in effect at the time of trial), similarly provided, in part, as follows:

> "§ 374-a. Admissibility of certain written records.
>
> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

(3) Section 929 of the Longshoremen's and Harbor Workers' Act (33 U. S. C., § 929) reads as follows:

> "Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the Secretary may by regulation require, and shall be available to inspection by the Secretary or by any State authority at such times and under such conditions as the Secretary may by regulation prescribe."

(4) Section 930(e) of the same Act provides as follows:

> "Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal."

B. *Rule*

Rule 43(a) of the Federal Rules of Civil Procedure provides in part:

> "* * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

C. *Regulations*

The regulations of the Department of Labor pertaining to the Longshoremen's and Harbor Workers' Compensation Act, 20 C. F. R. 01.11 *et seq.* in pertinent part provide:

> 1. "01.13 Forms.
>
> "Forms for use under the Longshoremen's Act are as follows:
>
> * * *
>
> "US-202 Employer's first report to Deputy Commissioner of accident or occupational disease."
>
> 2. "§ 31.3 Report by employer of injury or death.
>
> "Within 10 days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, or from the date the employer has knowledge of the injury or of any disease proximately caused by the employment or of death of an employee within the purview of said act, the employer shall send to the deputy commissioner for the compensation district in which occurrence took place, upon a form prescribed for that purpose by the Bureau, a report of such injury or disease, giving the particulars thereof. Where the injury or disease results in death,

the employer, immediately upon learning of the death, shall furnish on a form prescribed by the Bureau for that purpose, a supplemental report of the death. The employer shall, at the times and in the manner required, submit such additional reports in respect of the injury or death of his employee as the deputy commissioner may request."

3. "§ 31.23 Employer's record of injury or death.

"Every employer shall keep a record in respect of any injury to an employee. The record shall contain information of disease, other disability, or death in respect of such injury and shall be available to inspection by the Bureau or by any State authority."

Statement of the Case

Petitioner, an employee of respondent, brought an action under the Federal Employers' Liability Act for injuries allegedly sustained while he was operating a tractor at Pier 66, North River, New York, near midnight on December 24, 1956. Petitioner at that time was helping to unload a car float by driving a tractor hauling six flat trucks from a float over a gangplank to the pier and back over the gangplank to the float for reloading. Petitioner claims that he suffered a back injury on one of these return journeys (see Opinion Below, Petition, p. 11a).

The place where the accident occurred was a crucial issue at the trial and counsel for both petitioner and respondent are in agreement that if the accident took place on the gangplank leading from the pier to the float it occurred upon "navigable waters" and petitioner's sole remedy would be that provided by the Longshoremen's and Harbor Workers' Compensation Act (Petition, p. 2; *Pennsylvania R. Co.* v. *O'Rourke,* 344 U. S. 334 [1953]).

On December 26, 1956, after petitioner had returned to work, respondent reported the accident (Defendant's Exhibit EE) to the New York Office of the Department of Labor as required by Section 930(a) of the Longshoremen's

Act (33 U.S.C. § 930[a]) and retained a carbon copy thereof (Defendant's Exhibit CC) as required by Section 929 of the Longshoremen's Act (33 U.S.C. § 929) (see Opinion Below, Petition, pp. 11g-11h).

The form of report (Defendant's Exhibit EE) prescribed by the Department of Labor included one item reading "Place where injury occurred" and another, "Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard". In reply to the first item, respondent's freight agent wrote "Float No. 183 on north side of Pier 66 NR". In answer to the latter item, the report stated "He pulled a line of empty trailer trucks up the plank when his tractor stalled halfway up. Another operator pushed the line from behind with his tractor up the plank. In doing so, Taylor was jarred."*

Petitioner testified that while he was on the bulkhead of the pier and was approaching the gangplank he stopped about three feet from the gangplank to change gears and thereupon the last truck in his string of six was struck by a tractor driven by another employee of respondent, Arthur Green.

This was the only evidence at the trial which tended to show that the accident did not occur on the gangplank itself. In addition to the report to the Department of Labor and the carbon copy thereof (Defendant's Exhibits EE and CC, respectively) respondent introduced the following evidence to show that the injury occurred on the gangplank**:

> (1) The eyewitness testimony of Arthur Green, petitioner's co-worker, who said that he observed petitioner's tractor stalled on the gangplank and in trying to reach a position to push the flats attached to petitioner's tractor Green's tractor inad-

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* On page 5 of the Petition it is stated that the Labor Department report contained the language there quoted. Actually the language quoted in the Petition is from Defendant's Exhibit BB for Identification, an intra-company report which was not admitted in evidence.

** Petitioner is thus in error when he indicates that respondent's sole proof on this issue consisted of the Department of Labor report and the carbon copy thereof (see Petition, p. 4).

vertently struck petitioner's rear flat truck at an angle (Def. App.* pp. 12a-25a).

(2) The statement by petitioner to Dr. Falk, made on January 8, 1957, that the accident occurred on the gangplank (Def. App. pp. 2a-3a).

(3) Dr. Falk's treatment card (Defendant's Exhibit Z) recording plaintiff's statement that the accident occurred on the gangplank (Def. App. pp. 2a-6a, 34a).

In addition, the St. Clare's Hospital record (Defendant's Exhibit X), where petitioner was taken immediately after the accident, containing the history obtained at the emergency ward, had a statement that the accident occurred on the gangplank at Pier 66. While the hospital record was admitted, the Trial Court (erroneously, we believe) excluded the statement relating to the place of the accident on the ground that the hospital report was merely an "abstract" of the original hospital record (App.** p. 104a). The Trial Court also excluded (erroneously, we contended) respondent's intra-company report (Defendant's Exhibit BB for Identification), which the evidence established was made in the ordinary course of business (App. pp. 97a-100a), and this too indicated that the accident took place on the gangplank.

At the trial, petitioner's counsel conceded that the report to the Department of Labor (Defendant's Exhibit EE) and the carbon copy (Defendant's Exhibit CC) were both records made in the regular course of business. At the time of the offer of these documents, counsel for respondent suggested that both documents be marked, but the Trial Court ruled that it was necessary initially to mark only one of the statements, the carbon copy (Defendant's Exhibit CC), and that a stipulation could then cover the other document, the original report to the Department of

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* "Def. App." refers to the Appendix to Brief for Defendant-Appellee filed in the Court of Appeals.

** "App." refers to Petitioner's Appendix filed in the Court of Appeals.

Labor (Defendant's Exhibit EE). The following colloquy then took place before the jury (App. p. 102a):

> "The Clerk: Document marked for identification as Defendant's Exhibit CC.
>
> "The Court: Show it to your adversary. It's apparently subject to the same ruling. Not quite.
>
> "Mr. Fuchsberg: Same objection.
>
> "The Court: In other words, you don't raise any question of its being made in their course of business but as to its general admissibility?
>
> "Mr. Fuchsberg: Yes. I object to writing notes to one another.
>
> "The Court: No. You better take a look at that one. This is not an intra-company report. Look at the heading.
>
> "Mr. Fuchsberg: I saw it. I make the same objection."

While in the later argument before the Court counsel for petitioner did refer to *Palmer* v. *Hoffman* and some recent decisions of the Court of Appeals, he did not retract his concession that these two documents were made in the regular course of business, but, instead, concentrated his efforts upon attempting to convince the Trial Court that the reports lacked indicia of reliability (App. pp. 116a-124a).

At the trial petitioner's counsel did not object to the admission of the report to the Department of Labor (Defendant's Exhibit EE) on the ground that such a report was excluded by the language of Section 930(c) of the Longshoremen's Act. This objection was raised for the first time on the appeal to the Court of Appeals for the Second Circuit (see Opinion Below, Petition, p. 11l).

Argument

Petitioner contends that this Court should review the decision below because the Court below "misconstrued, misapplied and unduly restricted" this Court's decision in

Palmer v. *Hoffman*, 318 U. S. 109 (1943). He also contends that the decision below is in conflict with the decisions of the Courts of Appeals for the Sixth and Ninth Circuits, citing *Dilley* v. *Chesapeake & Ohio Railway Company*, 327 F. 2d 249 (6th Cir. 1964) and *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (9th Cir. 1957), cert. denied 356 U. S. 975 (1958).

Neither contention has any merit whatever. The decision below was made by an experienced court, well aware of the *Palmer* v. *Hoffman* doctrine, and offers no conflict with either that case or the *Dilley* and *Standard Oil* decisions.

a. The Palmer v. Hoffman doctrine is inapplicable.

In *Palmer* v. *Hoffman*, the excluded report was made by the engineer of the train (later deceased) who was directly involved in the accident and who made the statement obviously with the intent to exculpate himself and his employer, and this Court held that the trial court properly excluded the document which was offered under the Federal Business Records Act.

The report here in question (Defendant's Exhibit EE) was required to be made by the Longshoremen's Act, was not made by a participant who would naturally try to avoid liability, and the portion of the document objected to did not relate to the issue of negligence (*i.e., how* the accident occurred), but simply to *where* it took place.

The Court of Appeals for the Second Circuit stated that the report in question in this case was similar to that held admissible in *United States* v. *New York Foreign Trade Zone Operators*, 304 F. 2d 792 (2nd Cir. 1962). In discussing the nature of the report, the Court below said (Petition, pp. 11i-11j):

> "The statement in the Foreign Trade Zone case, as in this, had elements of both disadvantage and advantage to the entrant's employer. Both statements were admissions of liability for compensation. The report in Foreign Trade Zone afforded a basis

for recovery by the employer against a third person, 5 U. S. C. § 776, whereas the statement here afforded a basis for the employer's defending against suit under the FELA. The cases are similar also in that each entrant, unlike the engineer in Palmer v. Hoffman, had no personal involvement in the accident and, in all likelihood, no awareness of the manner in which his entry might work to the employer's advantage. The report here was made when, so far as the record shows, no one thought Taylor had suffered any serious injury*, and it can hardly be assumed that a freight agent would appreciate the witty diversity whereby the difference of a few feet in the place of an employee's injury would result in the imposition of a distinct legal regime. The B & O freight agent's report that Taylor's accident occurred on the gangplank, making the B & O thus liable to pay compensation under the Longshoremen's Act, is a far cry from Judge Frank's description of Palmer as a case 'where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability,' 129 F. 2d 976, 991 (2 Cir. 1942) (italics omitted). See Judge Clark's concurring opinion in the Foreign Trade Zone case, supra, 304 F. 2d at 799."

The Court of Appeals said (see Opinion Below, Petition, p. 11i) that the report here was also similar to those which it held admissible in two other cases, in one of which certiorari was denied by this Court: *Naylor* v. *Isthmian*

* In point of fact, petitioner returned to work on the first working day after the accident and worked for more than ten months thereafter. There is thus no basis for the statement in the Petition (p. 7) "that the report was here made for the purpose of future litigation."

S. S. Co., 187 F. 2d 538 (2nd Cir. 1951), and *Terrasi* v. *South Atlantic Lines*, 226 F. 2d 823 (2nd Cir. 1955), cert. denied 350 U. S. 988 (1956).

Furthermore, as we have seen (pp. 7-8, *supra*), at the trial, counsel for petitioner in effect conceded that the record in question was made in the regular course of business and his attack on the admissibility was directed at an attempt to show that the record did not bear the indicia of reliability.*

In addition, there is here involved not only the Federal Business Records Act but a similar New York State Act, former Section 374-a of the New York Civil Practice Act which was in effect at the time of trial (see p. 3, *supra*), and under Rule 43(a) of the Federal Rules of Civil Procedure the record was properly admitted under the New York Act, even if conceivably it were barred by the Federal Business Records Act (which we deny). This is made clear by a recent New York appellate ruling in *Bishin* v. *New York Central Railroad Company*, 20 A D 2d 921 (2nd Dept. 1964). In that case, shortly after the accident in question, the defendant railroad's conductor made a written report in the regular course of business which stated that warning signals had been given at the crossing where the accident occurred. This was an important issue in the case. The plaintiffs-respondents contended that the report was properly excluded under the *Palmer* v. *Hoffman* doctrine. In holding that the report should have been admitted, the Appellate Division, Second Department, declared (id. at 921-922):

> "**** Finally, it was error to exclude an employee's report of the railroad grade crossing accident solely on the ground that it was self-serving. The statute (CPLR 4518; former Civ. Prac. Act, § 374-a) renders admissible records made in the regular course of business; the statute makes no exception for records

* It should be noted that in his instructions to the jury the Trial Court here specifically pointed out to the jury that no one knew from what source the information appearing on the report to the Department of Labor was obtained and instructed the jury that hearsay evidence of this sort is "often less reliable than testimony in open court" (App. pp. 34a-35a).

which also happen to be self-serving. It has been observed that the self-serving aspect of a record does not preclude its admissibility under the statute but is merely a consideration affecting the weight to be given to it (*Publishers' Book Bindery* v. *Ziegelheim,* 184 Misc. 559)."

b. There is no conflict between the decision below and the decisions of the Sixth and Ninth Circuits.

In *Dilley* v. *Chesapeake & Ohio Railway Company, supra,* the Sixth Circuit held that a report by the railroad company's employee as to how (as distinguished from where) the accident occurred was not admissible as an admission on the part of the defendant railway company for the reason that the employee did not have authority to bind his employer. The statement there was similar to the one involved in *Palmer* v. *Hoffman* and was not required to be filed under any statute.

Standard Oil Company of California v. *Moore, supra,* was a treble damage antitrust action brought against seven major oil companies. The exhibits which the Ninth Circuit held to be inadmissible included memoranda, letters and reports dealing with pricing and marketing policies of oil companies other than those of the ones in which the writings were found and contained expressions of opinion or conclusions. See 251 F. 2d at 213-214. The Court also pointed out that the plaintiff had failed to prove that there was any systematic or routine procedure being followed in the preparation and filing of certain of the records (251 F. 2d at 215). Obviously, therefore, the excluded writings in the *Standard Oil Company* case have no resemblance to the record here involved.

Thus, there is no conflict whatever between the decision below and those of the Sixth and Ninth Circuits cited by petitioner.

c. The objection, first raised on appeal, that Section 930(c) of the Longshoremen's Act barred admission of the record is untenable.

Section 930(a) of the Longshoremen's Act provides that within ten days from the date of injury a report should be made to the Department of Labor. Section 930(c) provides that any report made under subdivision (a) shall not be evidence of any fact stated in such report "in any *proceeding*" with respect to the injury on account of which the report is made (emphasis supplied).

In the context of the Longshoremen's Act, it is evident that the word "proceeding" in this exclusionary clause refers to proceedings under the Longshoremen's Act and not to actions at law for damages.*

Where Congress has intended that a report should not be admitted in an action at law for damages it has clearly stated so. Thus, in Section 41 of Title 45 U.S.C. it is provided that no report of railroad accidents required under Section 38 of that Act shall be admitted as evidence or used for any purpose "in any *suit or action for damages* growing out of any matter mentioned in said report or investigation" (emphasis supplied). Similar language referring to "any suit or action for damages" appears in statutes relating to the inadmissibility of reports under the Boiler Inspection Act (45 U.S.C. § 32), reports made by motor carriers (49 U.S.C. § 320[f]) and reports of airplane accidents made to the Civil Aeronautics Board (49 U.S.C. § 1441[e]). Cf. *Palmer* v. *Hoffman, supra,* 318 U. S. at 114-115.

Thus, the fact that the Longshoremen's Act refers to "any proceeding" rather than "any suit or action for damages" clearly indicates that Congress was referring to compensation proceedings under that Act.

Section 929 of the Longshoremen's Act provides that every employer shall keep a record of any injury to an em-

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* Other sections of the Longshoremen's Act clearly indicate that the word "proceeding" used in the Act refers to a compensation proceeding. See 33 U.S.C. §§ 919(h), 923(b), 924, 926, 927(a) and (b).

ployee and the Act does not provide any limitation on the use of such record in "any proceeding" or in "any suit or action for damages". Thus, even if there were error in the admission of the report to the Department of Labor (Defendant's Exhibit EE) such error was harmless, since the carbon copy thereof (Defendant's Exhibit CC) was clearly admissible under the doctrine established by this Court in *St. Regis Paper Co.* v. *United States,* 368 U. S. 208 (1961), with respect to copies of census reports retained in a company's files.

The two contentions of respondent referred to above were noted but not passed upon by the Court of Appeals (see Opinion Below, Petition, pp. 11j-11k). The Court below, however, did uphold a third contention of respondent, namely, that petitioner's failure to make an objection at the trial upon the ground that Section 930(c) of the Longshoremen's Act barred admission of the record precluded him from raising it for the first time on appeal (see Opinion Below, Petition, p. 11l). The Court below was clearly correct both as a matter of general law as expressed by Wigmore and as a matter of federal law (ibid.).* It further stated (ibid.):

> "To allow an objection to evidence that should have been made and might well have been sustained at trial to be advanced for the first time on appeal produces a trial that would otherwise have been avoided; in these days of crowded calendars and congested courts, such a luxury can be permitted only in rare cases when necessary to prevent a clear miscarriage of justice. We have no conviction that that such is the case here; we think rather that the jury showed usual good sense in regarding Taylor's claim concerning the *locus* of the injury as

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* Petitioner cites 1 Wigmore, *Evidence* (Third Ed.) § 18, to the effect that if "there is no purpose at all for which the evidence could have been admissible" then an objection, though naming an untenable ground, will thereafter be effective. This, of course, obviously has no application to the report in question for it clearly had a purpose in tending to establish the place where the accident took place.

an afterthought. Furthermore, the party offering the evidence might have decided to forego it and rely on other testimony if he had been apprised of this added basis of vulnerability."

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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